APPENDIX.

Internal Revenue Code:

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

(a) *Gross Income from Sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

* * * * *

(4) *Rentals and royalties.*—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; and

(5) *Sale of real property.*—Gains, profits, and income from the sale of real property located in the United States.

(6) *Sale of personal property.*—

For gains, profits, and income from the sale of personal property, see subsection (e).

(c) *Gross Income from Sources Without United States.*—The following items of gross income shall be treated as income from sources without the United States:

* * * * *

(4) Rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for

the use of or for the privilege of using without the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like properties; * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 119.)

SEC. 143. [As amended by Sec. 5 of the Revenue Act of 1940, c. 419, 54 Stat. 516]. WITHHOLDING OF TAX AT SOURCE.

* * * * *

(b) *Nonresident Aliens.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under sec-

tion 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 15 per centum thereof, * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 143.)

SEC. 211. [As amended by Sec. 4, Revenue Act of 1940, *supra*]. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *No United States Business or Office.*—

(1) *General Rule.*—

(A) *Imposition of tax.*—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 15 per centum of such amount, * * *

* * * * *

(26 U. S. C. 1940 ed., Sec. 211.)

SEC. 212. GROSS INCOME.

(a) *General Rule.*—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.

* * * * *

(26 U. S. C. 1940 ed., Sec. 212.)

Treasury Regulations 103, promulgated under the income tax provisions of the Internal Revenue Code:

SEC. 19.119–5. *Rentals and royalties.*—Gross income from sources within the United States includes rentals or royalties from property located within the United States or from any interest in such property, including rentals or royalties for the use of or the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property. The income arising from the rental of property, whether tangible or intangible, located within the United States, or from the use of property, whether tangible or intangible, within the United States, is from sources within the United States.

SEC. 19.143–2. *Fixed or determinable annual or periodical income.*—Only fixed or determinable annual or periodical income is subject to withholding. The Internal Revenue Code specifically includes in such income, interest, dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations and emoluments. But other kinds of income are included, as, for instance, royalties.

Income is fixed when it is to be paid in amounts definitely predetermined. Income is determinable whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income need not be paid annually if it is paid periodically; that is to say, from time to time, whether or not at regular intervals. That the length of time during which the payments are to be made may be increased or diminished in ac-

cordance with someone's will or with the happening of an event does not make the payments any the less determinable or periodical. A salesman working by the month for a commission on sales which is paid or credited monthly receives determinable periodical income. The share of the income of an estate or trust from sources within the United States which is distributable, whether distributed or not, or which has been paid or credited during the taxable year to a nonresident alien beneficiary of such estate or trust constitutes fixed or determinable annual or periodical income within the meaning of section 143 (b). The income derived from the sale in the United States of property, whether real or personal, is not fixed or determinable annual or periodical income. Such items as taxes, interest on mortgages, or premiums on insurance paid to or for the account of a nonresident alien landlord by a tenant, pursuant to the terms of the lease, constitute fixed or determinable annual or periodical income.

SEC. 19.211–7. *Taxation of nonresident alien individuals.*—For the purposes of this section and sections 19.212–1, 19.213–1, 19.214–1, and 19.217–2, nonresident alien individuals are divided into three classes: (1) nonresident alien individuals not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, and deriving in the taxable year not more than $21,600 gross amount of fixed or determinable annual or periodical income from sources within the United States; * * *

(*a*) *No United States business or office.—General rule.*—A nonresident alien individual within

class (1), referred to in the preceding paragraph, is liable to the tax upon the amount received from sources within the United States, determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income. For the purposes of section 211 (a), the term "amount received" means "gross income." Specific items of fixed or determinable annual or periodical income are enumerated in the Internal Revenue Code as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensation, remunerations, and emoluments, but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. As to the determination of fixed or determinable annual or periodical income, see section 19.143–2. * * *

* * * * *

SEC. 19.212–1. *Gross income of nonresident alien individuals.*—* * *

* * * * *

(*a*) *No United States business or office.*—The gross income of a nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein at any time during the taxable year, whether such alien comes within section 211 (a) or section 211 (c), is gross income from sources within the United States consisting of fixed or determinable annual or periodical income. His taxable income does not include profits derived from the effecting of transactions in the United States in stocks, securities, or commodities (including

hedging transactions) through a resident broker, commission agent, or custodian, or profits derived from the sale within the United States of personal property or real property located therein.

* * * * *

The report of the Senate Finance Committee on the 1936 Revenue Act stated as follows (S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21, 23 (1939-1 Cum. Bull. (Part 2) 678, 691-693)):

"Your committee concurs in the main in the substantial changes made by the House Bill in our present system of taxing nonresident aliens and foreign corporations. It seems obvious that a surtax on undistributed corporate profits is not well adapted to the taxation of a foreign corporation with foreign shareholders in respect of its income from sources within the United States. In section 211 (a) it is proposed that the tax on a nonresident alien not engaged in a trade or business in the United States and not having an office or place of business therein, shall be at the rate of 10 percent on his income from interest, dividends, rents, wages, and salaries and other fixed and determinable income, with no allowance for the deductions from gross income and credits against net income allowed to individuals subject to normal tax and surtax on net income. * * * This flat tax (in the usual case) is collected at the source by withholding as provided for in section 143. Such a nonresident alien will not be subject to the tax on capital gains, including so-called gains from hedging transactions, as at present, it having been found administratively impossible effectually to collect this latter tax. It is believed

this exemption from tax will result in considerable additional revenue from the transfer taxes and from the income tax in the case of persons carrying on the brokerage business. The principal increase in revenue will result, however, from withholding tax on dividends heretofore not required.

"In the case of a nonresident alien engaged in trade or business in the United States or having an office or place of business therein, the same tax is levied upon his net income from sources within the United States as is levied upon the American citizen or resident under the House bill.

* * * * *

"In the case of a foreign corporation not engaged in trade or business within the United States and not having an office or place of business therein, the House bill would levy a flat rate of tax of 15 percent on the gross income of such corporation from interest, dividends, rents, salaries, wages, and other fixed and determinable income from sources within the United States (not including capital gains), the tax being collected in the usual case by withholding at the source, with no deductions or credits allowed. Your committee concurs in the substance of these provisions but recommends an amendment to section 231 of the House changing the rate of tax on such income, * * *.

* * * * *

"Your committee believes that the proposed revision of our system of taxing nonresident aliens and foreign corporations will be productive of substantial amounts of additional revenue, since it replaces a theoretical system impractical of administration in a great number of cases."

In the

Supreme Court of the United States

October Term 1945

No. 1151

SAX and ROSE ELIZABETH ROHMER,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MEMORANDUM OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

May 10, 1946

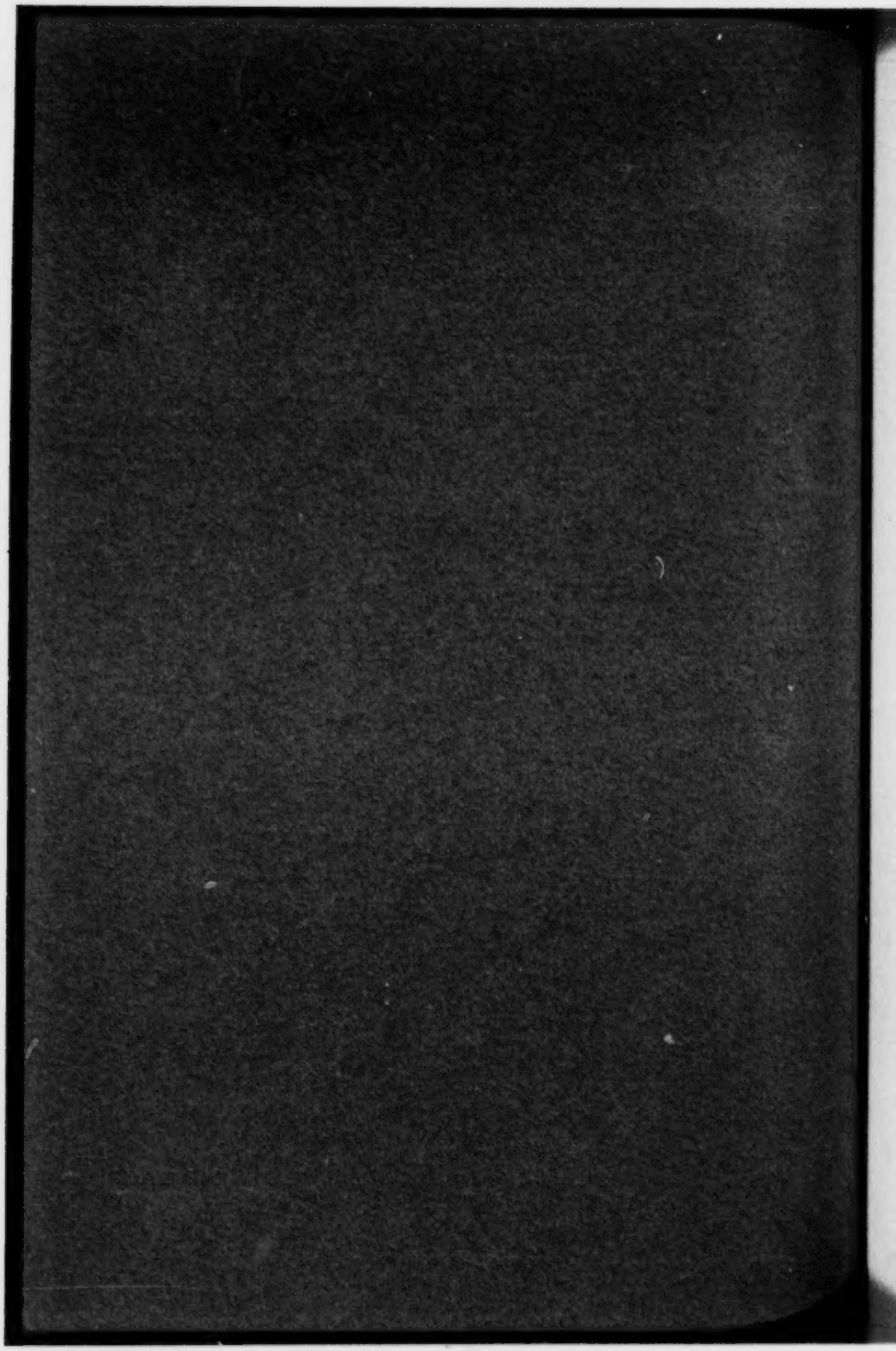

TABLE OF CASES

	PAGE
Helvering v. *Griffiths,* 318 U. S. 371, 395, 397	2
Helvering v. *Winmill,* 305 U. S. 79, 83	2
Lynch v. *Alworth-Stephens Co.,* 267 U. S. 364, 370	3
Old Colony Railroad Co. v. *Commissioner,* 284 U. S. 552, 560	3
United States v. *Dakota-Montana Oil Co.,* 288 U. S. 459, 466	2
Woolford Realty Co. v. *Rose,* 286 U. S. 319, 327	3

OTHER CITATIONS

Internal Revenue Code	
Section 143(b)	1
Section 211(a)(1)(A)	1
Treasury Regulations 103	
Section 19.143-2	1
Section 19.211-7	1
Section 19.212-1-(a)	1
Senate Report No. 2156 (74th Congress, 2d Session, p. 21; 1939—1 C. B. (Part 2) 691)	2

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

SAX AND ROSE ELIZABETH ROHMER, *Petitioners,* *against* COMMISSIONER OF INTERNAL REVENUE *Respondent.*	No. 1151

MEMORANDUM OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

This memorandum is filed because the effect of the decision of the Circuit Court of Appeals for the Second Circuit in this case is to eliminate from Sections 143(b) and 211(a) (1)(A) of the Internal Revenue Code the requirement that payments to non-resident aliens, not engaged in trade or business in the United States and not having an office or place of business therein, be "annual or periodical" income in order to be (a) taxable to them and (b) subject to withholding of tax thereon by withholding agents. The requirement that income paid to such non-resident aliens be "annual or periodical" in order to require either withholding or taxability continues to appear in both of the just cited sections of the statute and also in the applicable Treasury Regulations (i.e., Sections 19.143-2, 19.211-7 and 19.212-1-(a) of Treasury Regulations 103), which Regulations have acquired the added sanction of the repeated reenactment of the statute since they were first promul-

gated under the Revenue Act of 1936. See *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Helvering* v. *Griffiths*, 318 U. S. 371, 395, 397.

The sole basis for the opinion of the Court below in this case that no further effect is to be given to the words "annual or periodical" contained in the statute *and in the Regulations*, is a paraphrase of Section 211(a) of the Revenue Act of 1936 which appears in the Committee Reports on the Revenue Bill of 1936 (e.g., Senate Report No. 2156, 74th Congress, 2d Session, page 21; 1939-1 C.B. (Part 2), 691). That paraphrase omits a number of categories of income mentioned in the statute and refers to "fixed and determinable" income rather than to the phrase "fixed or determinable annual or periodical" income used in the statute and the Regulations. The Committee Report upon which the Court below relies does not purport to eliminate the phrase "annual or periodical" which remains in both the statute and the Regulations. Neither does it attempt to interpret that phrase. It merely omits it in a paraphrase of the statute, an omission which surely has no legal effect, and which neither the Congress when it passed the statute, nor the Treasury when it adopted its interpretative Regulations, chose to follow.

Every withholding agent in the United States is affected by the decision of the Court below in this case. A withholding agent must, as an agent of the United States, make a decision, at his peril, as to what is the proper tax to be withheld. His position is peculiarly such that his duties should be defined with certainty. That applies not only to withholding agents residing within the Second Judicial Circuit, but also to those residing within the other nine Judi-

cial Circuits and the District of Columbia. All require an authoritative interpretation of the law by this Court with respect to the requirements of withholding in order that they may perform the duties imposed upon them by the Internal Revenue Code. Only an opinion of this Court can properly instruct withholding agents in a situation in which, to quote the candid statement of the Court below, "the Congressional purpose is not crystal-clear and * * * the legislative history does not put beyond all conceivable doubt the purpose to impose a tax on such transactions as that before us here".

There can be no doubt from a reading of the opinion of the Court below that it has, by judicial decision, eliminated the words "annual or periodical" which the Congress placed in the sections of the statute applicable both to withholding agents and to non-resident aliens. Moreover, even had the decision below been made in an attempt to give effect to the words "annual or periodical" by interpreting them to include the payment involved in the instant case, such an interpretation would have been so far outside the ordinary meaning of those words as to cause confusion which can be remedied only by a decision of this Court. Cf. *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 327; *Old Colony Railroad Co.* v. *Commissioner,* 284 U. S. 552, 560; *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364, 370.

The instant payment was a lump sum payment in 1940 of $10,000 for the American and Canadian serial rights, without limitation of time, to a story. The payment was not conditioned upon any use of the story and it is stated in the findings of fact of the Tax Court that it does not appear whether the serial rights were ever used. (5 T.C. 183, 185) The $10,000 payment was accordingly a pay-

ment made without relation to any period of time and without relation to any period of use. It may be assumed for the purpose of argument that a lump sum advance payment of interest or rent might nevertheless be "annual or periodical" in nature because interest and rent are based upon annual or other periods of time and their amount is computed with respect to such periods of time. However, a lump sum payment which is made without respect to any period of use or any period of time (annual or otherwise) cannot be said to be "annual or periodical" within the ordinary meaning of that term.

It is respectfully urged that this Court grant the petition for certiorari.

Respectfully submitted,

ROSWELL MAGILL,

GEORGE G. TYLER,
as *Amici Curiae*,
15 Broad Street,
New York 5, N. Y.

May 10, 1946.

FILED
MAY 1 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1151.

SAX and ROSE ELIZABETH ROHMER,
Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MEMORANDUM AS AMICI CURIAE ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

J. ROBERT RUBIN,
Attorney for Loew's Incorporated.

SAMUEL D. COHEN,
Of Counsel.

R. W. PERKINS,
Attorney for Warner Bros. Pictures, Inc.

JOSEPH D. KARP,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Argument 2

Conclusion 10

TABLE OF CASES CITED:

Buechner, Matter of, 226 N. Y. 440 8

Deputy v. *duPont*, 308 U. S. 488, 84 L. Ed. 416. . . . 2

General Aniline and Film Corporation v. *Commissioner*, 139 Fed. (2d) 759 6

Goldsmith v. *Commissioner* (C. C. A. 2d), 143 Fed. (2d) 466 (cert. denied, 323 U. S. 774) 4

Koshland v. *Helvering*, 298 U. S. 441 10

National Lead Co. v. *United States*, 252 U. S. 140. . . . 10

Old Colony Railroad Co. v. *Commissioner of Internal Revenue*, 284 U. S. 552, 76 L. Ed. 484 2

Sabatini v. *Commissioner* (C. C. A. 2d), 98 Fed. (2d) 753 . . . . . 3, 4, 5

OTHER AUTHORITY CITED:

Reg. 94:

Art. 143-2 9

Art. 211-7 (a) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1151.

SAX and ROSE ELIZABETH ROHMER,
Petitioners,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MEMORANDUM AS AMICI CURIAE ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners and the respondent on the application for certiorari have consented to the filing of this memorandum.

Loew's Incorporated and Warner Bros. Pictures, Inc., herein called the Intervenors, frequently produce motion pictures based on the works of alien authors, in the course of which they acquire from alien owners or authors (ordinarily not doing business here) exclusive world motion picture rights, outright and forever, for which payment is made in a lump sum in full consideration for the rights acquired.

Because of the apparently plain and unambiguous language of the Revenue Act and Treasury Department regulations, Intervenors paid many such alien owners their full consideration, without withholding income tax therefrom, for there was no authority found

in the statutes, the regulations, or court decisions, to authorize or require any withholding. Now under the interpretation of the Revenue Act in the instant case, your Intervenors may be found personally accountable for such aliens' taxes, although they will be unable in many cases to obtain the return of any part of the payments previously made to these authors. In any event the decision of the Court below leaves matters of importance in great doubt and confusion. Intervenors therefore urge that a review and decision by this Court is necessary and desirable.

The pertinent facts, and the statutes and regulations involved, appear in the petition and brief of Petitioners Sax and Rose Elizabeth Rohmer.

Argument.

This Court has uniformly ruled that the revenue statutes should be interpreted in accordance with the plain and ordinary meaning of the language employed, unless there is explicit proof of Congressional intention to the contrary. *Old Colony Railroad Co.* v. *Commissioner of Internal Revenue,* 284 U. S. 552, 76 L. Ed. 484; *Deputy* v. *duPont,* 308 U. S. 488, 84 L. Ed. 416. Intervenors here find no such proof to the contrary.

No statutory wording, prior Circuit Court decisions, or regulations promulgated by the Commissioner of Internal Revenue, gave the Intervenors at any time in question, any apparent grounds or right to withhold tax from the consideration contracted for, where the transaction was a purchase, without limit of time or reversion, of all motion picture rights in a particular work. It is submitted that such transactions, particularly when paid for in lump sum,

are not subject to withholding (and are not taxable to a non-resident alien after the 1936 revision) unless the words and language of the statute and the regulations are given a strange and unusual meaning. It is felt that such an interpretation has now been given them by the Circuit Court opinion.

Prior to 1936, non-resident aliens (not doing business here) were taxed on all income from United States sources, but not all such income was subject to withholding. In 1936, it was apparently recognized that there had been a substantial loss *in collection* of such taxes. As a result the 1936 Act changed the plan of alien taxation, by making aliens taxable only as to income subject to withholding at the source, and added "dividends" to the classes of income from which tax must be withheld. (Dividends are not involved in the instant case.)

Since 1936, it seems agreed that whatever income is taxable as to a non-resident alien not here doing business, is also subject to withholding, and vice versa.

The Treasury regulations have always held, that only "fixed or determinable *annual or periodical** income" was subject to withholding, and the words quoted above are the exact words found in the Act as it stood both before and after 1936. (And since 1936, the same quoted wording is found in the section taxing the income of non-resident aliens not doing business here.)

In *Sabatini* v. *Commissioner* (C. C. A. 2d), 98 Fed. (2d) 753 (involving a tax year prior to 1936), the question was whether acquiring a right to use motion picture rights for a limited period was, (a) a sale, or (b) a license whose consideration would *prima facie*

* Italics throughout are ours.

be prepaid royalty. The Court in holding it was not a sale, pointed to facts showing that what was there transferred, was only a right of use for a limited ten year period. There was also in evidence in that case, the fact that after that limited period, there were options to continue the right of use from year to year by annual payments. Your Intervenors assumed, and we believe logically, that a contrary result would have been indicated in the *Sabatini* case (which as Petitioners point out could have no application as against them for the reason that it construed the statute as it existed prior to the 1936 revision) had the transaction been an outright purchase forever without reversion. Your Intervenors believe that the foregoing contrasting attributes, are always the crucial test of a sale in common parlance, as well as legal.

Later the same Circuit Court, in *Goldsmith* v. *Commissioner,* 143 Fed. (2d) 466 (cert. denied, 323 U. S. 774), expressed the view in its majority opinion, that a conveyance of the exclusive motion picture rights in a play, without limitation of time or any reversion, was a sale.

It is submitted that a sale, legally and by common usage, clearly means to a taxpayer or purchaser, a transaction where one buys outright from another without reversion or limit of time. In contrast, a use or occupation for a limited period followed by complete termination and reversion, is not a sale.

Your Intervenors contend that the opinion in this case, does not follow the well established rule that the usual meaning be given to words and phrases. Certainly including dividends in the withholding section and making taxable only income subject to withholding, could not indicate a Congressional intent to

apply any new or strange definition of a sale. Intervenors also contend that the Court further erred in holding that the 1936 revision was intended to eliminate the words "annual or periodical" in *interpreting* the section, where these very words were in the section before 1936 and were retained and re-enacted in that section in the 1936 revision, as well as in all subsequent revenue acts.

Reverting to the opinion of the Circuit Court, the Intervenors call particular attention to the Court's comment upon the *Sabatini* case. Said the Court: "True, there the transfer was but for a limited time while here the time is unlimited; that, we think, *is a distinction without a difference,* since here, as in *Sabatini,* the transfer was but of a limited part of the author's bundle of rights, * * *." But there is a difference. A use for a limited period followed by complete termination and reversion, is basically the exact opposite of a purchase of ownership forever with no reversion. It is a difference, and a most important one, for this is the customary test of what is a sale. The difference is what distinguishes a sale from that which is not a sale. And here it should be borne in mind, that motion picture rights are a complete and well established class of rights which constitute personal property, and they are the specific rights usually needed and acquired by the motion picture industry.

The opinion further seems to consider that the intent of the Act was to determine whether a transaction was a sale, by comparing the amount of personal property acquired by the purchaser, as compared with that retained by the seller. We submit that this is not the test. The test rather is whether

there is any reversion to the seller in what the purchaser bought. The Court decided erroneously that where an author in writing a work acquired a "bundle" of rights that were personal property, unless he sold them all (or perhaps substantially all) to one buyer in one sale, there was no sale. In support of our contention we call attention to the ruling of the same Court which held in *General Aniline and Film Corporation* v. *Commissioner,* 139 Fed. (2d) 759, that although some of the original patent rights of the author were not included in the sale, the transaction, nevertheless, was still a sale of a patent. In its present opinion the Court explains that holding, by indicating that it would only be a sale, if the remainder was "relatively insubstantial." It is our contention that any test based on the *quantity* of personal property conveyed, has no support in the Act or in the report of any Committee, and is a new and unusual definition or test of a sale, and that such a test is unscientific and much too uncertain for practical operation, and would lead to confusion.

Why should a motion picture company, which acquires forever all the literary and dramatic personal property rights which it customarily uses and which is all that it needs in its established trade (*i. e.*, all motion picture rights and rights incidental thereto in the author's work) be less a purchaser of such personal property, than one who buys all the property rights the author may have in his work, including stage rights, publishing rights, etc.? It has no need for any other rights possessed by the seller and has no interest in them. They would not aid even slightly in the production of a motion picture. The copyright act protects and mentions specifically motion pictures, and any such class of rights under copyright may be transferred

independently of other or remaining rights or property.

Intervenors contend that the Court erred in deleting the words "annual and periodical" in construing these sections. It seems that any plain and natural interpretation of the sections, restricts its application to income of this nature. In reaching its decision, the Court below excised the very pertinent words "annual or periodical" and the only apparent reason given for doing so, seems to be that in the 1936 revision, the Committee Report stated its purpose was to tax "gross income from interest, dividends, rent, wages and salaries and other fixed and determinable income." Because the Committee did not go on and also quote the words that followed in the section (*i. e.*, "annual or periodical") the Court held these words should be omitted in construing the section. But it is obvious that the Committee did not attempt to quote all the wording of the section.

The Court seems to have considered this obvious summary of the general purpose of the section as plain proof of Congressional intent to omit from *its construction,* the words (*"annual and periodical"*) which were reenacted in 1936 in the section.

We submit that it is elementary that a Committee Report briefly referring to a purpose cannot be held to override a statute or be considered authority for reading out of the section all that is contained therein merely because the Committee did not care to mention the omitted portion in its Report. On the Court's theory, if a Committee Report quoted only half of a section, the remaining part actually in the section but not quoted would be presumed to have no purpose, and be of no force or effect. We are reminded that,

"Excision is a 'desperate remedy'." (Cardozo, *J.*, in *Matter of Buechner,* 226 N. Y. 440, 443.)

The Court also seems to have felt that the deleted words must also be omitted in construction because the Committee stated its belief that the new 1936 system of taxing and withholding would be "productive of substantial amounts of additional revenue, since it replaces a theoretical system in practical administration in a great number of cases." Surely such a purpose should not be construed to mean that a section reenacted word for word (with only "dividends" added) would thereafter, (a) make taxable and subject to withholding new or different classes of income (other than dividends), or (b) create a new definition of what is a sale which is based on the *quantity* of property sold, or (c) eliminate in construction three most important words which were always found in the section and again reenacted into it. These three words are in our opinion determinative whether or not the payment is taxable, and we relied upon these three words in our dealings with foreign authors. We submit that what was principally in the mind of the Committee, was that in 1936 dividends were obviously a very large source of revenue to aliens, and that by then making dividends also subject to collection of tax at source, increased revenue was to be expected, and that this change gave rise to the quoted statement found in the Committee Report.

The enactment of the Revenue Act of 1936, changed the law with respect to non-resident aliens to make taxability and withholding coterminous. The Commissioner's regulations in respect to withholding have therefore become especially important in determining

the taxability of a non-resident alien not doing business here. Art. 211-7 (a) of Reg. 94 promulgated under the income tax provisions of the Revenue Act of 1936, expressly directs taxpayers to Art. 143-2 of the same regulations "as to the determination of fixed or determinable annual or periodical income." Subsequent regulations contain the same directions. Art. 143-2, insofar as it applies to the instant case, is identical with the language contained in the regulations in force both before and after the 1936 amendment. A cursory as well as a close reading of this article makes it "crystal clear" that Petitioner was not taxable in this case. This Court is respectfully referred to the following words appearing therein:

> "Only fixed or determinable annual or periodical income is subject to withholding. * * *
>
> "Income is *fixed* when it is to be paid in amounts definitely predetermined. Income is *determinable* whenever there is a basis of calculation by which the amount to be paid may be ascertained. The income *need not be paid annually if it is paid periodically*; that is to say, *from time to time,* whether or not at regular intervals. * * * The income derived from the *sale* in the United States of *property*, whether real or personal, *is not* fixed or determinable annual or periodical income.* * *" (Italics supplied.)

The Commissioner in allowing the foregoing words of his regulation to remain unchanged after the 1936 amendments thereby showed that he, too, saw no Congressional intent to delete the words "annual or periodical" from the statute, and his presentation of this argument to the Court below was *in extremis* in a hopeless situation. Nevertheless, it worked. It is

apparent that in accepting this argument the Court below did not "give great weight to an administrative interpretation long and consistently followed, particularly when the Congress, presumably with that construction in mind, has re-enacted the statute without change." *Koshland* v. *Helvering,* 298 U. S. 441; *National Lead Co.* v. *United States,* 252 U. S. 140.

Your Intervenors, therefore, request this Court to grant certiorari, on the grounds that the transaction in the instant case had all the attributes of a sale and was a sale under all previously established definitions of that term, and for the additional reason that the income in question was not income of an "annual or periodical" nature.

Respectfully submitted,

J. Robert Rubin,
Attorney for Loew's Incorporated.

Samuel D. Cohen,
Of Counsel.

R. W. Perkins,
Attorney for Warner Bros. Pictures, Inc.

Joseph D. Karp,
Of Counsel.